In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PLAINTIFF IN ERROR
v.
JOSEPH WEISSMAN ET AL. } No. 391

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

ARGUMENT

I

This court has jurisdiction of the writ of error allowed in the case at bar

The case is before this court on writ of error sued out under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246. A motion to dismiss this writ was filed on behalf of defendants earlier in this Term, to which a brief in opposition was filed on behalf of the United States. Hearing on the motion has been postponed to the hearing on the merits. In view of the aforesaid brief of the Government, which fully recites the facts (pp. 1–3) to which we refer to avoid repetition, it is unnecessary now to do more than make brief reference to the jurisdictional point. The point

arose in the following manner: After the petit jury had been empanelled, and without any motion pending seeking the quashing or dismissal of the indictment, and without the presentation of any evidence on the merits, the trial judge addressed the jury as follows (R. pp. 84 and 85):

> Gentlemen of the jury, when you were here before to consider this case upon the motion of the defendants that the court dismiss the indictments, counsel for the defendants and the Government presented arguments covering the questions then raised. These arguments were both lengthy and searching as to the law and facts, in so far as they were set forth in the indictment. Much time was spent in the research of the law applicable to the legal questions raised by the motion. The court considered the claims made on both sides and decided that the questions involved, in view of the conflict of authority, should be presented to the highest tribunal in our judicial system for its determination, the Supreme Court of the United States, but after consideration of this whole subject I decided that such procedure was not in accordance with the rules of practice, and therefore concluded that the course suggested by me could not be followed.
>
> Subsequently the defendants withdrew the motion to dismiss.
>
> This leaves the case ready for trial, just as it was before the arguments referred to were made, but in view of all the facts and the law submitted to the court and the court con-

cluding, as it does, that the indictment is invalid, because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty, and that will dispose of the case for your purpose.

You may retire.

It is contended by defendants in error that the aforesaid action of the court does not fall within the terms of the Criminal Appeals Act, and therefore the writ of error allowed the Government under that Act must now be dismissed.

While the case is one of first impression, and may perhaps be regarded as requiring a somewhat liberal interpretation of the Criminal Appeals Act in order to bring the case within its scope, nevertheless, in view of the impending defeat of justice in this case through action of the court below which is at least out of harmony with orderly procedure, the Government believed it should not accept the judgment below as final unless this court should affirmatively declare it to be so.

For ready reference the Criminal Appeals Act, supra, is here quoted:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any

indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Does it not seem to be more than a mere coincidence that *after* the jury was empanelled, and the trial about to proceed, defendants should be permitted to file a "motion to quash and dismiss the indictment" on certain specified charges (R. pp. 14 and 29), that the court should take time to hear extended arguments thereon (R. pp. 30 et seq.), that thereafter the court should conclude the questions raised by the aforesaid motion were of sufficient importance to certify to this court for solution

(R. pp. 82 and 83), that shortly thereafter a "motion to withdraw motion to quash and dismiss the indictment" should be filed but never affirmatively allowed (R. p. 15), that when the Government opposed the motion to withdraw the motion to dismiss, the court should hold that the motion to withdraw was an actual withdrawal, notwithstanding the fact that the motion as framed plainly disclosed that counsel for defendants considered the consent of the court necessary (R. pp. 15, 17, and 18); that thereafter without any pending motion, and with the statement that the case now stands for trial upon the defendants' plea of not guilty (R. p. 18), the court nevertheless held the indictment invalid, and instead of entering an order quashing or dismissing it, sought to accomplish the same effect by directing the jury to return a verdict of not guilty, thus creating a situation which would not only possibly relieve the defendants from any further criminal liability, but might also make a review of its ruling by this court impossible. As further demonstrating a possible purpose to deprive the Government of its right of review, attention is called to the fact that on May 25, 1922, the court filed a certificate of its reasons for declaring the indictment defective in which it recited that in reaching its conclusion it construed certain sections of the Criminal Code and the Bankruptcy Act (R. p. 19), while on February 12, 1924, nearly two years thereafter, in determining what should constitute the record, the court undertook to hold that in its action declaring the indictment defective,

no statutory construction was involved (R. pp. 87 and 88), and therefore its previous allowance of a writ of error should be vacated (R. p. 90).

The question, therefore pressing, for consideration is whether the extraordinary procedure followed below has, as contended by the trial court and counsel for defendants, removed the case from the application of the Criminal Appeals Act, supra.

An examination of that Act discloses that a review by this court is authorized, among other things, of "a decision or judgment quashing * * * any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

It seems clear (1) that the decision of the trial court that "the indictment is invalid" (R. pp. 84 and 85), when considered from the point of view of its substance rather than mere form, is the reasonable equivalent of a decision quashing the indictment, and this result is not altered by the fact that the court thereupon directed the jury to return a verdict solely on account of such invalidity of said indictment. Stated somewhat differently, the court's decision is not less a decision quashing the indictment because the court insisted on making the jury a partner in taking that action. *United States* v. *Barber*, 219 U. S. 72, 78; *United States* v. *Oppenheimer*, 242 U. S. 85; and *United States* v. *Thompson*, 251 U. S. 407, 412. When the court decided that the indictment was invalid, such decision effec-

tively quashed the indictment, and the verdict of the jury added nothing to that result. Secondly, it seems not open to argument that the decision of the court was based upon the construction of the statutes involved, as demonstrated by the motion to dismiss and quash the indictment (R. p. 14), the argument thereon (R. p. 61), and the court's specific statement of reasons for holding the indictment invalid (R. p. 19). The long-after labored attempt by the court to show that it did not construe the statutes (R. pp. 87 et seq.) is now entitled to no serious consideration.

Of course it is to be also noted that the Criminal Appeals Act forbids review by this court in any case in which there has been a verdict in favor of the defendant. If this provision means a verdict directed by the court merely to give attempted effect to its decision holding the indictment invalid, then we concede that the Government is without a right of review in this case, and the motion to dismiss should be granted. Such a course of procedure, if upheld, however, opens the door for effective destruction of the remedies afforded the Government by the Criminal Appeals Act. Is it not the more reasonable view that the verdict specified in the statute means a verdict on some part of the merits involved in the case—e. g., a man is on trial under an indictment containing numerous counts, some of which are quashed by the court during the trial, and on the others the defendant is acquitted. Such a verdict would seem to be of the type required by the Criminal Appeals Act.

II

The indictment here involved states an offense under the applicable statutes

It was the view of the court below that where the conspiracy to have a bankrupt conceal his assets was formed and the overt acts in pursuance thereof were done prior to actual bankruptcy, no offense under Section 37 of the Criminal Code and Section 29b of the Bankruptcy Act of July 1, 1898, Chap. 541, 30 Stat. 554, was committed.

Section 37 of the Criminal Code reads as follows:

> If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both.

Section 29b of the Bankruptcy Act, supra, reads as follows:

> A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently (1) concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt or used any such claim

> in composition personally or by agent, proxy, or attorney or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

There seems to be no legal barrier or difficulty to the forming of an indictable conspiracy and committing overt acts in furtherance thereof prior to the assumption by one of the conspirators of the status in which alone the substantive crime which is the object of the conspiracy can be committed. The exact point here involved is not new. It has been decided favorably to the Government in such cases as *Greenspahn* v. *United States*, 298 Fed. 736, 738, and the cases therein cited. The Circuit Court of Appeals for the Seventh Circuit said in that case:

> While no witness testified that a bankruptcy proceeding was in actual contemplation of the alleged conspirators, this does not necessarily bar conviction for a conspiracy to violate section 29b. Conspiracy to violate this section may be shown, without any proof of appointment of a trustee, or of pendency then or thereafter of bankruptcy proceedings. *Meyer* v. *United States*, 258 Fed. 212; 169 C. C. A. 280; *Steigman* v. *United States*, 220 Fed. 63; 135 C. C. A. 631; *Radin* v. *United States*, 189 Fed. 568; 111 C. C. A. 6; *United States* v. *Cohn* (C. C.), 142 Fed. 983.

In the Radin case cited in the foregoing excerpt this court refused a certiorari, 220 U. S. 623, case No. 1049.

For further elaboration of this point see argument below on motion to dismiss set forth in the record at pages 61 et seq.

The foregoing relates to count one of the indictment.

III

Count two of the indictment charging aiding and abetting is valid

The court's objection to the second count of the indictment appears to be twofold, (1) that all acts of aiding and abetting were committed prior to bankruptcy, and (2) there can be no aiding and abetting because the bankrupt alone can commit the offense.

This count of the indictment is based upon Section 332 of the Criminal Code which reads as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

The second count here under consideration clearly charges Joseph Weissman with violating Section 29b of the Bankruptcy Act, and as to him is not open to the court's objection.

As to the aiders and abettors it is difficult to understand upon what legal theory the court concluded that they must commit some act after bankruptcy. If the intent and natural result of the acts committed

was to bring about an actual ultimate violation of the statute, the time when such acts were committed can be of no legal consequence. Certainly, if those who conspire and commit overt acts prior to bankruptcy can not escape liability as pointed out in the cases hereinbefore cited, and apparently approved in *United States* v. *Rabinovich*, 238 U. S. 78, 84, it would be difficult to find a legal basis for holding that if the substantive offense is actually committed, the conspirators did not through their conspiracy and overt acts "cause, procure, aid, and abet" the commission of such substantive offense. The principle of law which upholds the conspiracy charge here involved necessarily and for the same reasons requires that the aiding and abetting count be now held valid.

IV

It is respectfully submitted that the judgment below should be reversed.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1924.

O

391
(1924)
No. 1032.

Supreme Court of the United States

UNITED STATES OF AMERICA—PLAINTIFF IN ERROR,

against

JOSEPH WEISSMAN, ET ALS.

In Error to the District Court of the United States for the District of Connecticut.

Defendants in Error Motion to Dismiss and Brief in Support of Said Motion.

Benjamin Slade

Attorney for (Some) Defendants in Error,
152 Temple Street,
New Haven, Conn.

INDEX.

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET AL.
Defendant-in-Error.

MOTION OF JOSEPH WEISSMAN, MORRIS NALETSKY, AARON B. WEISSMAN, JACOB ANCHELOWITZ, LOUIS WOLF, AND MORRIS RENCOFF TO DISMISS THE ALLEGED WRIT OF ERROR.

And now come the alleged defendants-in-error aforesaid, and move the Court to dismiss the alleged writ of error herein, for the following reasons:

1. On February 11, 1924, the District Court of the United States for the District of Connecticut, wherein the above entitled cause originated, denied the plaintiff-in-error's petition for a writ of error, and on said date, vacated an order passed on the 6th day of June, 1922, granting plaintiff-in-error's petition for a writ of error, and allowing the same.

2. Because of the order of the District Court of the United States for the District of Connecticut, passed on February 11, 1924, the plaintiff-in-error has no standing before this Court, and there are no proceedings either in error or appeal.

3. Because there was a verdict of "not guilty" in favor of the defendants-in-error rendered by the jury in the District Court of the United States for the District of Connecticut in the above entitled cause.

4. Because no writ of error can be taken or allowed the United States in any case where there has

been a verdict in favor of the defendants-in-error, as in the instant case, as is by statute in such case made and provided.

5. Because the record discloses that the District Court of the United States for the District of Connecticut concluded and ruled that the indictment is invalid because no offense is properly charged, and therefore no valid conviction can be had under it, and no writ of error lies from such ruling and determination of the Court, by virtue of the statute in such case made and provided.

6. Because it appears from the record that no decision or judgment quashing or setting aside or sustaining a demurrer to the indictment or any count thereof was made, or that such decision or judgment was based upon the invalidity or construction of a statute upon which the indictment is founded.

7. Because it appears from the record that no decision arresting a judgment of conviction for insufficiency of the indictment based on the invalidity or construction of a statute upon which the indictment was founded, was made by the Court.

8. Because it appears from the record that no decision or judgment was made by the Court below sustaining a special plea in bar when the defendants-in-error have not been put in jeopardy.

9. Because it appears from the record, and particularly from the opinion of the District Court of the United States for the District of Connecticut, rendered February 11, 1924, that the verdict in the instant case was directed upon the proposition that the indictment was invalid, and no offense was properly charged in it, and no valid conviction could be had thereunder.

9. Because this Court, upon the facts appearing in the record, has no jurisdiction on this proceeding to re-

view the rulings of the District Court of the United States for the District of Connecticut under the provisions of the Criminal Appeal Act of March 2, 1907.

10. Because the plaintiff-in-error seeks a review by this Court of a decision of the lower Court concerning subjects not embraced within the clauses of the Criminal Appeal Act of March 2, 1907.

11. Because under the Criminal Appeal Act of March 2, 1907, this Court is given the special right to review in favor of the United States questions limited by the very terms of the statute and none others, and the record in the instant case does not present any question falling within the limitations prescribed by said Criminal Appeal Act.

12. Because it appears from the record that the Judgment of the Court below did not involve questions of statutory construction of a character reviewable under the Criminal Appeal Act of March 2, 1907.

Copies of this motion, together with notice of date of presentation, have been served upon opposing counsel.

WHEREFORE, the above described defendants-in-error pray that the present proceedings be dismissed.

Dated at New Haven, this 31st day of May, 1924.

Benjamin Slade

Attorney for the Above Named
Defendants-in-Error.

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET AL.
Defendants-in-Error.

Benjamin Slade, of New Haven, being duly sworn, deposes and says:

I am now, and for about thirty years last past have been a practicing attorney, and have been the attorney of record for several of the alleged defendants-in-error in the above entitled cause since the same was instituted, and have personally been active as attorney in behalf of such defendants in all of the proceedings in said cause, and am familiar with all of said proceedings.

On May 8, 1922, the United States District Court for the District of Connecticut directed the jury which was empanelled to try the above entitled cause, to bring in a verdict of not guilty, and the Court, as a part of its instructions to the jury, stated as follows:

> "But in view of all the facts and the law submitted to the Court, and the Court concluding as it does that the indictment is invalid because no offence is properly charged, and that therefore no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

In pursuance to the directions of the Court, the jury did, on May 8, 1922, render a general verdict of not guilty.

On June 6, 1922, the United States of America, acting by the office of the District Attorney for the District

of Connecticut, filed certain papers with said United States District Court of Connecticut, in alleged proceedings for a writ of error to this Court, and your affiant and other attorneys representing other defendants in said cause, and the District Attorney's office for the District of Connecticut thereafter appeared before the said United States District Court for the District of Connecticut for the purpose of considering what shall constitute the record on the Government's effort to take a writ of error in this case, and at said hearing, counsel for the defendants in said cause claimed that the United States of America, under the Criminal Appeal Act, upon the facts in this case, could not take, nor could the District Court of the United States for the District of Connecticut allow the United States of America to take or sue out a writ of error to the United States Supreme Court.

On February 11, 1924, the District Court of the United States for the District of Connecticut sustained the contentions of the defendants-in-error in respect to the subject aforesaid, and directed the entry of an order vacating the ex-parte order granted the United States on June 6, 1922, allowing said writ of error, and denying the United States its petition for such writ of error, as more fully appears by a copy of the Court's opinion, hereto annexed and made a part hereof.

Neither your affiant nor (so far as your affiant is informed) any of the other attorneys representing some of the defendants in the above entitled cause have received any notice of any character or description, either from the District Attorney's office of the District of Connecticut, or the Attorney General of the United States, or the Solicitor General of the United States, on February 11, 1924, or thereafter, with respect to any contemplated

proceedings by the United States with reference to said alleged writ of error.

The first notice your affiant had with respect to any effort on the part of the plaintiff-in-error to pursue the alleged proceedings on the writ of error was a letter received from the Solicitor-General of the United States, dated May 16, 1924, copy of which is hereto annexed and made a part hereof.

Your affiant, as the attorney for some of the alleged defendants-in-error aforesaid, has never had presented to him any proposed record in this proceeding since February 11, 1924, and up to the date hereof; nor has he seen since said date any proposed record in these proceedings compiled, prepared or submitted to the Clerk of the United States District Court for the District of Connecticut.

Your affiant is informed and believes that the United States of America, acting through the United States District Attorney for the District of Connecticut, subsequent to the date of the finding of the indictment by the Grand Jury in the above entitled cause, procured another and different indictment against the said defendants, based upon the same subject matter as is stated in the indictment in the instant case, and that said later indictment is still pending in the District Court of the United States for the District of Connecticut; and said later indictment your affiant believes, remedied most of, if not all of the claimed legal defects in the present indictment, which were urged for the Court's consideration in the instant case.

Your affiant carefully examined the provisions of the Criminal Appeal Act of March 2, 1907, and is of the opinion that this Court, upon the record in the instant case, has no jurisdiction in the premises.

Your affiant is therefore of the opinion that these proceedings should be dismissed.

Benjamin Slack

Subscribed and sworn to
before me, this 31st day
of May, 1924.

Samuel H Platner

Notary Public.

Copy.

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

May 16, 1924.

Benjamin S. Slade, Esq.
200 Broadway
New York, N. Y.

Sir:

I beg to advise you that on May 26, 1924, I will submit to the Supreme Court of the United States a motion to advance the case of United States, Plaintiff in Error, vs. Joseph Weissman et al, for hearing at as early a date during the October 1924 term as will suit the convenience of the Court.

Copies of the motion will be forwarded to you as soon as they are received from the printer.

Very truly yours,

James M. Beck,

Solicitor General.

H

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

JOSEPH WEISSMAN, ET AL.
Defendants-in-Error.

Sirs:

Please take notice that Joseph Weissman, Morris Naletsky, Aaron B. Weissman, Jacob Anchelowitz, Louis Wolf and Morris Rencoff, who are some of the alleged defendants-in-error in the above entitled cause, will move before the Supreme Court of the United States, in the court room at the City of Washington, in the District of Columbia, on 6th day of October 1924, upon the opening of court on that day, or as soon thereafter as counsel can be heard, to dismiss the proceedings upon the grounds more fully set forth in said motion to dismiss, which is hereto annexed and made a part hereof; and for such other and further relief as to the Court may seem just and proper in the premises.

Dated at New Haven, this 29th day of August, 1924.

Benjamin Slade

Attorney for the Above Named
Defendants-in-Error.

To Hon. Allan K. Smith,
United States District Attorney for the District of Conn.
Hon. James M. Beck, Solicitor General
of the United States

UNITED STATES OF AMERICA,
STATE OF CONNECTICUT,
NEW HAVEN, COUNTY.

ss. New Haven, May 22, 1924.

I, Theresa V. Brennan, being duly sworn, depose and say:

That I am secretary to Benjamin Slade, attorney at law, with offices at 152 Temple Street, New Haven, Connecticut, and that I then and there mailed, by depositing in the post office at New Haven, postage prepaid, an envelope addressed to Hon. James M. Beck, Solicitor General of the United States, care of the office of the Attorney General of the United States at Washingon, D. C., containing a true duplicate of the within and foregoing motion to dismiss, copy of affidavit and notice of motion.

THERESA V. BRENNAN.

Subscribed and sworn to
this 22nd day of May,
1924, before me.

BENJAMIN SLADE,
Notary Public.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET ALS.,
Defendants-in-Error.

Brief of Some of the Defendants-in-Error on Motion to Dismiss.

Statement.

The defendants-in-error were indicted for an alleged conspiracy to violate section 37 of the Criminal Code and section 29A of the Bankruptcy Act. After a jury was empaneled and sworn the defendants raised the question of the legal sufficiency of the indictment and the Court sustained such claim and directed, on May 8th, 1922, a verdict of not guilty.

The Court in directing the verdict stated to the jury, among other matters, as follows: "But in view of all the facts and the law submitted to the Court, and the Court concluding as it does that the *indictment is invalid because no offense is properly charged,* and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty." (Italics ours.)

On June 6th, 1922, the plaintiff-in-error presented to the trial Court a petition for a writ of error and the Court made an ex-parte order granting the same.

Shortly before February 11th, 1924, the plaintiff-in-error gave notice to defendants-in-error that an application would be made to the trial Court for the purpose of determining what should be included in the record on

the proposed proceedings in error. At such hearing defendants-in-error objected to the allowance of the writ because the same could not be taken or allowed under the Criminal Appeal Act of March 2nd, 1907.

On February 11th, 1924, the United States District Court for the District of Connecticut, by an order then made, vacated its ex-parte order of June 6, 1922, allowing the writ of error and denied plaintiff-in-error's petition for such writ of error.

Since the Court's ruling on February 11, 1924, was made the plaintiff-in-error started the present activities.

POINT I.

Under the Criminal Appeal Act of March 2, 1907, 34 Stat. at L., chap. 2564, this Court had no jurisdiction to review the questions determined by the Court below.

The trial Court ruled that the indictment is legally insufficient and invalid because no offense is properly charged and no valid conviction can be had under it.

See Judge Thomas' Memorandum of Decision of February 11, 1924. This ruling on the authorities of this Court is not reviewable by the Supreme Court of the United States.

U. S. vs. Keitel, 211 U. S., 370;
U. S. vs. Stevanson, 215 U. S., 190;
U. S. vs. Carter, 231 U. S., 492.

In *U. S. vs. Carter, supra,* this Court sustained a motion to dismiss the writ of error for want of jurisdiction, adding that under the Criminal Appeal Act of March 2nd, 1907, it had no power to review a ruling of

the District Court, that the indictment "was bad in law".

The Court, speaking by Chief Justice White, at page 492 says:

> "It is settled that under the Criminal Appeal Act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the Court in a case under review erroneously construed the statute. * * * Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the Statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

Justice Day in *U. S. vs. Stevanson, supra,* in discussing this subject says at page 190:

> "The object of the criminal appeal statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this Court should be of the opinion that the statute, properly construed, did in fact embrace an indictable offense. * * * As the question of general law involved in the decision of the Court below is not within either of the classes named in the statute giving a right of review in this Court, we must decline to consider it upon this writ of error."

In *U. S. vs. Keitel,* 211 U. S., 492, this Court in discussing the subject says:

> "The right of the United States to come directly to this Court because of the construction of the statutes of the Court below, as we have previously said in considering the question of jurisdiction, is solely derived from the Act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting in this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

The record in the case at bar discloses that this case does not fall within any of the limitations prescribed by the Criminal Appeal Act of March 2nd, 1907.

POINT II.

The verdict of "Not Guilty" in favor of the defendants deprives this Court of Jurisdiction to consider and determine the questions raised by plaintiff in error.

The Criminal Appeal Act of March 2nd, 1907, provides as follows:

> "Provided, *That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.*" (34 State, 1246—Italics ours.)

In the instant case there was a verdict in favor of the defendants-in-error, and under the foregoing statute, the plaintiff-in-error cannot successfully ask to have this Court review and determine the correctness of the trial Court's action. Whether the trial Court was correct or wrong in directing the jury to return a general verdict of not guilty is not reviewable under the Criminal Appeal Act in question.

It should be noted that no "decision or judgment" was made by the trial Court "quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

On the contrary the trial Court ruled that the indictment under the general law is either bad in law or legally insufficient. This conclusion is evident from that portion of the trial Courts' charge to the jury as follows:

> "But in view of all the facts and the law submitted in the Court, and the Court concluding, as it does, *that the indictment is invalid* because no

offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty." (Italics ours.)

To remove any doubt as to what the trial Court had in mind when the verdict was directed, attention is respectfully called to the following language found in the trial Court's opinion and memorandum of decision of February 11th, 1924:

> "Thus it appears that the *verdict was directed because of the invalidity of the indictment and not because of the construction of the statute.*" (Italics ours.)

If the trial Court was mistaken in its conclusions that the indictment was legally insufficient, that ruling must stand and under the authorities as we read them, the conclusion cannot be reviewed.

U. S. vs. Stevenson (*supra*);
U. S. vs. Winslow, 227 U. S., 202;
U. S. vs. Yuginovich, 256 U. S., 450.

In *U. S. vs. Colgate & Co.*, 250 U. S., 300, it is held that the Federal District Court's interpretation of the indictment must be accepted by the Federal Supreme Court on a direct writ of error sued out under the Act of March 2nd, 1907.

POINT III.

There is no lawful record before this Court.

The record here shows that on June 6th, 1922, the trial Court, by an ex-parte order, granted the plaintiff-in-error's petition for a writ and allowed said writ.

On February 11th, 1924, the trial Court after discovering its mistake in allowing the writ and petition,

vacated its orders of June 6th, 1922. Under the Criminal Appeal Act the trial Court is expressly forbidden to allow a writ of error to the United States "in any case where there has been a verdict in favor of the defendant".

We assume that the plaintiff-in-error may urge that the trial Court, in directing a defendant's general verdict, was wrong. We feel it to be a sufficient answer to suggest that under the Act of March 2nd, 1907, this Court cannot review that question.

The Act in question makes no distinction between what might be termed a rightful verdict and an erroneous verdict. The language of the Act is:

> "* * * in any case where there has been a verdict in favor of the defendant."

On February 11th, 1924, when the trial Court discovered its erroneous action evidenced by the orders it passed on June 6th, 1922, allowing the writ of error, had the right to correct its erroneous action by passing the later orders of February 11th, 1924, vacating those made on June 6th, 1922.

If plaintiff-in-error believes that irrespective of the trial Court's conclusion a writ of error does lie in this case it seems to us that some proper process before this Court would test that question.

Instead of taking some such course the plaintiff-in-error's position now must be that though the trial Court disallowed the writ, yet the plaintiff-in-error can bring up what it terms a record that has no legal foundation to support it; namely, no writ of error at all was allowed and none exists.

POINT IV.

We herewith submit the trial Courts opinion in support of this motion to dismiss:

Copy.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, vs. JOSEPH WEISSMANN, ET ALS.	No. 1173 D. C.

MEMORANDUM OF DECISION RESPECTING THE WRIT OF ERROR

This matter was heard for the purpose of determining what shall constitute the record to be sent up to the Supreme Court on the writ of error allowed on June 6, 1922. This order was signed ex-parte and before counsel for defendant had opportunity to present their claims respecting the granting of the petition.

At the outset the defendants raise objection to the allowance of the writ, because of the provisions of the Criminal Appeals Act of March 2, 1907, Chapter 2564, Vol. 3, U. S. Compiled Statutes, Sect. 1704. The statute provides that a writ of error may be taken by the United States from the District Court direct to the Supreme Court in all criminal cases in certain instances, which, as provided for in the statute, are as follows:

> "From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any account thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where

such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance. Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

The record shows that there was no judgment quashing, setting aside or sustaining a demurrer to, the indictment, or any count thereof, where such decision or judgment was based upon the invalidity or construction of the statute upon which the indictment was founded which would properly bring this writ of error within the provisions of the Criminal Appeals Act of March 2, 1907; nor was there any decision arresting a judgment of conviction—nor any sustaining a special plea in bar.

On the other hand, the record shows that there was a verdict of not guilty which fact impels the conclusion that under the provisions of Section 1704 of the Compiled Statutes, quoted supra, the writ of error ought not to be allowed. But it is strenuously contended by the District Attorney that the writ should be allowed on the ground that the verdict of the jury, as directed by the

Court, was based upon the construction of the statute, thus bringing his contention within the ruling of the Supreme Court in *U. S. vs. Keitel,* 211 U. S., 370, 397; *U. S. vs. Stevenson,* 215 U. S., 190, 195; and *U. S. vs. Carter,* 231 U. S., 492.

But the transcript of what the Court said to the jury does not support the contention or conclusion of the District Attorney as the record shows that, in its instructions to the jury, the Court said, *inter alia,*—

> "But in view of all the facts and the law submitted to the Court, and the Court concluding, as it does, that the indictment is invalid because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

Thus it appears that the verdict was directed because of the invalidity of the indictment and not because of the construction of the statute.

The record in this case, in so far as it affects the question here presented, is as follows:

1. The Indictment.
2. The Court's Instructions to the Jury.
3. The Verdict.
4. The Judgment on the Verdict.

It is very apparent then that it is only such part of the statute that reads—"from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded", that might possibly be construed to include such a case as the one at bar.

We certainly have no decision arresting a judgment of conviction, and we certainly have no decision sustain-

ing a special plea in abatement. It seems to me that it is just as clear and just as certain that we have no decision or judgment quashing, setting aside or sustaining any demurrer to any indictment or any count thereof, and that in view of the holding by the Court, as appears from the instructions to the jury, that the indictment was invalid because no offence was properly charged, the writ of error ought not to be allowed.

In *United States vs. Keitel, supra*, the Supreme Court, in construing the Criminal Appeals Act of 1907, expresely holds that the instances wherein the Government may be allowed a writ of error, are confined to those specifically enumerated in the statute. Mr. Justice White delivering the opinion of the Court, on page 397, said:

> "The right of the United States to come directly to this Court because of the construction of the statutes of the Court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very

terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

In *United States vs. Stevenson*, 215 U. S., 190, Mr. Justice Day, on page 195, said:—

> "The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this Court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense."

And on page 196, the learned Justice, after quoting from the Keitel lease, said:—

> "As the question of general law involved in the decision of the Court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error."

In the Stevenson case the District Court of Massachusetts, on a demurrer to the indictment, held the second count thereof to be invalid for certain reasons. Had there been no demurrer the Supreme Court would not have reviewed the matter in the first place, but in view of the fact that there was a demurrer and not a verdict of a jury, as here, it went into the second question raised by the writ of error, viz:—whether or not the judgment on the demurrer was based upon the in-

validity or construction of the statute upon which the indictment was founded?

The cases above quoted seem clearly to sustain the contention of the defendants with reference to the objections to the allowance of the writ of error, and the decision in the Stevenson case, *supra*, brings us to a still further objection raised by the defendants which in substance is that if the writ of error is allowed the question which the Government desires the Supreme Court to review cannot be reviewed by that Court. The Stevenson case holds that the Supreme Court cannot review the trial Court's action involving the construction or validity of the indictment. In that case the Court held that the sufficiency of an indictment upon general principles of criminal law is not open to review in the Supreme Court on a writ of error under the Criminal Appeals Act. *United States vs. Winslow*, 227 U. S., 202, is authority for the proposition that the ruling of the District Court respecting the construction or interpretation of an indictment must be accepted in the Supreme Court when it is sought to have it reviewed in the Supreme Court and that that Court had no jurisdiction to review the interpretation of the indictment by the lower Court.

In *United States vs. Carter*, 231 U. S., 492, the Supreme Court held that under the Criminal Appeals Act of March 2, 1907, it has no power to revise the mere interpretation of an indictment by the Court below, but it is confined to ascertaining whether that Court erroneously construed the statute on which the indictment rested. On page 493, Chief Justice White said:—

> "On demurrer the Court quashed 43 of the counts because they were 'bad in law'. It is settled that under the Criminal Appeals Act we have no

authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the Court in a case under review erroneously construed the statute: *United States vs. Keitel,* 211 U. S., 370; *U. S. vs. Stevenson,* 215 U. S., 190, 195. Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

See also to the same effect *United States vs. Colgate & Co.,* 250 U. S., 300.

The real grounds for directing the verdict in the instant case were as stated by the Court in its instructions to the jury and were predicated upon the proposition that the indictment was invalid because no offence was properly charged in it, and that no valid conviction could be had thereunder.

It follows, therefore, that the ex-parte order allowing the writ of error, dated June 6, 1922, is vacated and the petition for the writ must be denied.

SO ORDERED.

February 11, 1924.

This motion to dismiss ought to be sustained.

Respectfully submitted,

Benjamin Ma

Attorney for Some of the Defendants-in-Error.

INDEX

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES OF AMERICA, PLAINTIFF-IN-ERROR
vs.
JOSEPH WEISSMAN, ET AL., DEFENDANTS-IN-ERROR } 391

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

BRIEF OF JOSEPH WEISSMAN, MORRIS NALETSKY, AARON B. WEISSMAN, JACOB ANCHELOWITZ, LOUIS WOLF AND MORRIS RENCOFF.

Some of the Named Defendants in Error.

POINT I

ON MOTION TO DISMISS.

These defendants, earlier in this term, filed in this Court, a Motion to Dismiss the writ of error, which remains undetermined, and which, we understand, will be considered in connection with the main argument of the case.

In obedience to the rule of this Court, the motion to dismiss is accompanied by a brief in support thereof, and we respectfully suggest a consideration of said brief and the authorities therein relied on.

The plaintiff-in-error, in its brief, takes the position that the Court below allowed the present alleged writ of error, but the record (R. P. 93) discloses a disallowance thereof.

We concede the Government's contention that once a writ of error is issued, the cause passes beyond the jurisdiction of the Court below.

This rule, however, as we believe, applies only to proper causes wherein a writ of error issues as a matter of right, and not to causes where a writ of error does not lie. The Government, in the instant case, evidently did not believe that it had an absolute right, under the Criminal Appeal Act of March 2, 1907, to a writ of error, for it presented a petition therefor, and prayed for its allowance. (R. P. 20-21.)

The Court, evidently believing that a writ of error must be granted as a matter of right, allowed the same (R. P. 22) in the first instance, but when it later discovered that the instant case is one in which, by the provisions of the Act of March 2, 1907, a writ of error can not be taken or allowed, as provided for in the Act, vacated its former allowance of same. (R. P. 18-24, inc.)

It can not be, if the Court erroneously granted a writ of error, that it can not revoke its order granting it, and refuse its allowance. An order vacating the original allowance of the writ of error remains in full force, and that being so, then there is no writ of error before this Court, unless this Court holds that the lower Court's order, vacating the original allownace of the writ, is inoperative, and of no force.

The plaintiff-in-error now contends that the Court's action in directing a verdict was erroneous.

It is our claim that the plaintiff-in-error cannot seek a review of the judgment of acquittal on the verdict of the jury, under the Criminal Appeal Act of March 2, 1907, even though the Court's action in directing a verdict was in fact erroneous.

U. S. vs. Sanges,
144 U. S. 310.
U. S. vs. Evans,
213 U. S. 297.

The motion to dismiss is well founded, and should be granted, as we believe.

POINT II.

THE FIRST COUNT OF THE INDICTMENT FAILS TO SET FORTH ANY OFFENSE COGNIZABLE IN THE UNITED STATES COURTS.

The first count of the indictment is founded on Sect. 37 of the Criminal Code and Sect. 29B of the Bankruptcy Act, which are fully quoted in the brief for the plaintiff-in-error.

It is our contention that an act which, when committed, is not a criminal offense under the laws of the United States, can not be made such by the happening of a subsequent event or events.

That very question was decided by this Court in the case of

U. S. vs. Fox,
95 U. S. 673.

Sect. 5132 of the Revised Statutes, in force in 1874, provided that:

> "Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor" who, within three months before the commencement "under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtains on credit, from any person, any goods or chattels, with intent to defraud" shall be punishable by imprisonment for a period not exceeding three years.

The defendant in that case was convicted, and upon a motion in arrest of judgment, the judges holding the Circuit Court were opposed in opinion, and have certified to this Court the question upon which they differed.

This question is thus stated in the certificate:

> "If a person shall engage in a transaction which, at the time of its occurrence is not a violation of any law of the United States, to wit: the obtaining of goods upon credit by false pretences and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

The Court, in speaking by Justice Field, says:

> "There is no doubt of the competency of Congress to

provide by suitable penalties for the enforcement of all legislation necessary or proper to the execution of powers with which it is entrusted. And as it is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States' it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system - - -"

"To legislate for the prevention of frauds in either of these particulars, when committed in *contemplation of bankruptcy*, would seem to be within the competency of Congress. Any act, committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. . .

"The act described in the ninth subdivision of Sect. 5132 of the Revised Statutes is one which concerns only the state in which it is committed; it does not concern the United States.

"It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so and we cannot supply qualifications which the Legislature has failed to express.

"Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court."

(Italics ours.)

From the above opinion, as we understand it, it is quite plain that it is there held that unless Congress prescribes an act, if done in contemplation of bankruptcy, shall be a crime, it is not such.

Jurisdiction of the United States Courts, under the Bankruptcy Act, attaches only, as we believe, when there is in fact a proceeding, either voluntary or involuntary. In the absence of such proceeding in bankruptcy, the Bankruptcy Act is legally inoperative and the Courts of the United States cannot have jurisdiction to punish an act committed and completed before any proceedings in bankruptcy occurred.

The plaintiff-in-error cites and relies upon the case of

Greenbaum vs. U. S.,
298 Fed. 736-738.

and the cases therein cited, in all of which it is in substance held

that a crime of conspiracy to violate Sect. 29B of the Bankruptcy Act may be successfully prosecuted by the United States, even though there be in fact no proceedings in bankruptcy.

The legal soundness of that proposition we challenge.

The case of

U. S. vs. Cohen,
142 Fed. 983

and some of the other cases cited with approval by the Court in the case of Greenbaum vs. U. S., supra, when examined, will be found to be largely supported by the assumption that the conspiracy to conceal assets, in violation of Sect. 29B of the Bankruptcy Act, continued up to and beyond the time of the proceedings in bankruptcy, and the commission of an overt act after the bankruptcy, to effectuate the purpose of the conspiracy.

After a diligent search, we were unable to find any decision of this Court upon the precise point, now contended for, other than the case of U. S. vs. Fox, supra. Of course it is well established that the Federal Courts have no jurisdiction over common law offences and punishment can be inflicted for violation of only such laws as are expressly enacted by Congress.

The Bankruptcy Act, by several of its provisions defines crimes that may be committed by bankrupts and others and provides penalties therefor, which, in some cases, differ from penalties for similar offences under the Revised Statutes of the United States. Does it not necessarily follow that if Congress intended that any act done in contemplation of bankruptcy should be punishable, it would have so provided in express terms by that Act?

In the absence of a specific act of Congress, making Sect. 37 and Sect, 332 of the Penal Code of the United States applicable to acts committed in contemplation of bankruptcy, those sections do not apply, as we believe.

By Article I, Sect. 7 of the Constitution of the United States, Congress has power "To establish a uniform rule of naturalization and *uniform laws on the subject of bankruptcy throughout the United States;*". (Italics ours.)

Under this provision, it was contemplated, as it seems to us, that a bankruptcy law, if established, will be "uniform" and will

in itself embrace everything that Congress found necessary to effectuate its purpose, including a definition of offences, classification of offenders, and the punishment for violations of its provisions.

It is only by such complete act that it can be "uniform" in practical effect.

Courts of bankruptcy, in various districts, now differ in opinion as to whether a person other than a bankrupt, can commit the crime of concealing assets under the Bankruptcy Act of 1898. A diversity of opinion also exists on other subjects arising under that Act.

If the suggestion we offer is sound that difference of opinion would not exist. Our claim, we believe, finds support in the history disclosed from the former Bankruptcy Acts of the United States.

A comparison of the Bankruptcy Acts of 1800, 1841 and 1867 with the Bankruptcy Act of 1898 will disclose that in the former acts, Congress prohibited by specific provision many acts that could be committed by third persons, as well as the bankrupt, and provided penalties therefor, but from the act of 1898, many of such provisions were omitted.

For instance, under Sect. 44 of the Bankruptcy Act of 1867, it was a misdemeanor for the bankrupt to obtain credit within three months before his bankruptcy, with intent to defraud, and such misdemeanor was punishable by a term not exceeding three years, upon conviction in any Court of the United States.

The various acts prohibited by that Section of the Act of 1867 are by specific language made to apply to acts *"after the commencement of proceedings in bankruptcy"*.. (Italics ours.)

Sect. 29 of the same Act regulates the effect of certain acts done *"in contemplation of becoming a bankrupt"*. (Italics ours.)

Sect. 35 of said Act again employs the term: *"in contemplation of insolvency or bankruptcy"*. (Italics ours.)

Sect. 7 of that Act expressly adopts the general perjury statute as a part of the act.

In Sect. 26 of the Bankruptcy Act of 1800, it was provided that:

> "If after a bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate before unknown to the Commissioner" (under the present Act known as trustee) "such person or persons shall be entitled to five per cent out of the effects so discovered, and such further reward as the Commissioner shall think proper;"

and the same section further provides:

> "And if any such trustee" (the term "trustee" as used in that Act evidently means the person who held the property which in fact belonged to the person who subsequently was adjudged a bankrupt) "having notice of the bankruptcy, wilfully conceal the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of creditors."

Sect. 16 of the Bankruptcy Act of 1800 prescribes penalties for persons other than the bankrupt, who shall *"fraudulently or collusively claim or detain property of the bankrupt."* (Italics ours.)

The Bankruptcy Act of 1841, in defining the effect of certain acts stated in Sect. 2 thereof, adopts the terms: *"in contemplation of bankruptcy."* (Italics ours.)

Sect. 4 of that Act, in specific terms, makes the general perjury statute a part of the Act.

Many of these provisions of the former Acts were omitted from the Bankruptcy Act of 1898, and particularly all provisions prohibiting acts done in contemplation of bankruptcy.

In those acts, when Congress intended to adopt the perjury statute as a part of the Act, it by specific terms did so.

Is it not reasonable to assume that if it was intended by Congress, at the time of the passage of the Bankruptcy Act of 1898, to make any then existing laws of the United States a part thereof, it would have done so by a specific provision in the Act?

This was actually done in former acts by adopting the perjury statutes as a part thereof.

Under the Bankruptcy Act of 1898, a person other than the bankrupt cannot be convicted for a criminal offence for concealing property belonging to the estate in bankruptcy.

Field vs. U. S. 137, Fed. 6.

There the Court says:

"Neither the offence nor the punishment herein described exists at common law. They are creatures of the act of Congress. In the absence of that act, no one could be legally punished by imprisonment, for having concealed property from his trustee in bankruptcy. In the presence of the Act, no one can be lawfully punished by imprisonment for its concealment, who is not by the terms of this statute subject to the punishment. The Act specifically designates the persons liable to the punishment which is prescribed. There are those who commit the offence denounced while they are bankrupt or after they have received their discharge in bankruptcy. Under the familiar rule, this specification by the statute of those who are bankrupts and those who have been bankrupts as the persons liable to the punishment necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offence that is denounced. . . . Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute.

"A man ought not to be punished unless he falls plainly within the class of persons specified by such statute. An act which is not clearly an offense by the express will of the legislative department of the Government must not be made so after its commission by a broad construction adopted by the judiciary.

"The definition of an offence and the classification of the offenders are legislative and not judicial functions and where, in this case at bar a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it by construction to a class of persons who are excluded from its effect by its terms, because in their opinion the acts of the latter are as mischievous as those of the class whose deeds are denounced."

In

U. S. vs. Deitrich
126 Fed. 685

the Court said:

"This is a prosecution for a criminal offence. *To be punishable, the act charged must have possessed at the time when its commission was completed, every element necessary to its criminality under the statute.* A completed act which is not an offence at the time of its commission can not become

such by any subsequent act of the party charged or of another, with which it has no connection; and this is true whether the first act was done for a good or a bad purpose." (Italics ours.)

The Court, in this case, cites with approval the case of

U. S. vs. Fox
supra.

The possible suggestion that the acts charged in the first count fall within the evils prohibited in Sect. 29B of the Bankruptcy Act would not warrant a prosecution if the acts so charged do not fall within the language of the Act.

That very question was determined in

U. S. vs. Sheldon
15 U. S. (2 Wheat.) 119-120.

That case involved the act of July 6, 1812, which provided that if any citizen of the United States, or person inhabiting the same, shall transport or attempt to transport, over land or otherwise, in any wagon, cart or sleigh, naval or military stores, arms or munitions of war, or any article of provisions from the United States to Canada, the thing by which the articles are transported, with the articles themselves, shall be forfeited and the person so transporting shall forfeit a certain sum and be guilty of a misdemeanor.

The Court decided then that in its ordinary acceptation, to convey in some one of the enumerated vehicles did not include the driving of living, fat oxen on foot, and it was not a transportation thereof, within the meaning of the statute.

See also

Kaufman vs. U. S.,
129 C. C. A.,
149 Fed. 212.
U. S. vs. Wiltberger,
5 Wheat 96.
U. S. vs. Clayton,
Fed. Cases 14814.
U. S. vs. Lake,
129 Fed. 499.

This Court, in the case of

U. S. vs. Rabinowitz,
238 U. S. 87,

in passing upon the subject now under discussion, said:

> "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in Sect. 29B (1) of the Bankruptcy Act can be perpetrated *by any other than a bankrupt* or one who has received a discharge as such." (Italics ours.)

The case of

U. S. vs. Grodsen,
164 Fed. 157,

is an authority for the proposition that it is not a crime, under Sect. 5440 of the Revised Statutes, and Sect. 37 of the Criminal Code, to conspire before the bankrutpcy to conceal assets and the actual removing and concealing of such assets before the bankruptcy and when the conspiracy terminated before the bankruptcy proceedings. In that case, by an indictment, the bankrupt,. and others, were charged with conspiracy to conceal property of a bankrupt from his trustee in violation of the Bankruptcy Act. The Court held that the indictment did not charge an offence under Sect. 5440 where it appeared that the conspiracy was formed and the property removed and concealed by the defendant prior to the bankruptcy.

The Court, in its opinion, says:

> "The indictment is challenged because, as it is argued, it does not allege a conspiracy to aid a bankrupt who concealed his property, but alleges a conspiracy formed before the bankruptcy, and that all three defendants should conceal. In the first count, it appears that the defendant F. C. was adjudicated a bankrupt on July 6, 1907 on an involuntary petition and his trustee was appointed July 30, 1907. In April and May, 1907, C., who was in the retail clothing business in Chicago, and became insolvent, and the defendants G. S. and G. N. knew of such insolvency. Thereupon, the three defendants arranged to have a large amount of C's stock of the value of $4164, shipped from his store to defendant G's, and they were so shipped and remained concealed until June, 1908, not being given up by G. or the other defendants to the trustee in bankruptcy. No overt act of concealment occurred after the bankruptcy. All that was done was for the defendants to fail to discover the goods or inform the trustee of their existence or place of concealment, and to fail to turn them over. . . .
>
> "It also charged by the first and third counts that if C was

adjudged a bankrupt, the defendants conspired to knowingly conceal from the trustee the aforesaid goods, and that in pursuance of the conspiracy and to effect the object thereof, the defendants concealed the property from the trustee and have at no time turned it over to him, nor has any person done so, and the defendants still continue to conceal such property.

"In other words, it is charged that defendants, after they had concealed the property, conspired to continue to conceal it, and did no act in furtherance thereof. That is, did no overt act to continue to conceal the property after the trustees had been appointed. They simply failed to act. Had they moved the property, or sold any part of it, the charge that they had conspired to conceal it might possibly be sustained, although two of them could not commit the offence of concealment. But in the absence of this, the indictment must be held to be bad and the demurrer is sustained."

It seems to us that the foregoing case is identical on the material questions in the case at bar.

The first count in the case at bar (R. P. 1-8) sets forth that the alleged conspiracy was formulated before the filing of the petition, and the last overt act was committed likewise before the filing of the petition, and thereby terminated, and no act, either of omission or commission is alleged as an overt act after the filing of the petition.

Upon this situation, the defendants in error contend that the alleged conspiracy terminated with the last overt act, and no crime is set forth in that count of which the United States Court has jurisdiction.

Further cases upon the proposition that unless the act charged is within the statute, the defendant can not be successfully prosecuted, are

U. S. vs. Sheldon,
15 U. S. (2 Wheaton) 119.

U. S. vs. Hall,
98 U. S. 358.

U. S. vs. Reinicke,
98 U. S. 447.

U. S. vs. Van Auken,
96 U. S. 336.

U. S. vs. Murphy,
3 Wall 469.

U. S. vs. Taffe,
86 Fed. Rep. 113.
U. S. vs. Payne,
22 Fed. 426.

A very instructive case on the point now under discussion is

U. S. vs. Crafton,
4 Dill. (U. S. 145).
Federal Cases No. 14,881.

There, the Court held that an indictment can not be sustained upon allegations of conspiracy to defraud when the fraud contemplated was only made a fraud upon the United States subsequent to the alleged conspiracy to commit it.

The alleged fraud in that case involved an effort to obtain from the United States Treasury the payment of a claim against the State of Missouri, the payment of which had not, at the time of the alleged conspiracy, been assumed by Congress.

Applying the principle of that case, expressed by the Court in the following langunge: (Dillon, J.)

> "However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that Sect. 5440 of R. S. of the U. S. cannot be extended to a case when the fraud which the conspiracy contemplated can only be effected in case an act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurred to indictment must be sustained."

to the instant case, the act of concealment is made a crime after the adjudication in bankruptcy, and the appointment of a trustee, and not before. The indictment must charge that the conspiracy was to do some act then made a crime by the laws of the United States, and it must state the acts intended to be carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was then a crime against the United States, and made such crime at the time the conspiracy was entered into, or when the last overt act was committed.

U. S. vs. Taffe, supra.
In re Wolf,
27 Fed. 606.
U. S. vs. Melfi,
118 Fed. 899.

In the case of

Pettibone vs. U. S.,
148 U. S. 1898

it is held that an indictment charging a conspiracy to corruptly and by threats and force to obstruct the due administration of justice in the United States Court, it must be averred and proved that the accused knew that the witness or officer was a witness or officer,

Attention is respectfully asked to Section 29 b (4) of the Bankruptcy Act of 1898 which is as follows:

"A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this Act." This provision of the Bankruptcy Act of 1898 indicates clearly that Congress did not intend to punish as criminal the receipt of property by any one before the filing of the petition in bankruptcy either by or against the person who transferred such property. If otherwise Congress would have added a provision making such acts criminal just as much for receiving before the filing of the petition as afterwards.

THE ASSIGNMENTS OF ALLEGED ERROR DO NOT PRESENT QUESTIONS THAT CAN BE REVIEWED BY THE FEDERAL SUPREME COURT ON A WRIT OF ERROR.

Under Subdivision 2 of Rule 21 of the Rules of the Supreme Court of the United States, it is provided as follows:

> "A specification of errors relied upon, which in cases brought up by a writ of error shall set out separately and particularly each error asserted and intended to be urged;—"

In the case of

Pettibone vs. U. S.,
148 U. S. 197,

it is held that an indictment charging a conspiracy to corruptly and by threats and force to obstruct the due administration of justice in the United States Court, it must be averred and proved that the accused knew that the witness or officer was a witness or officer, in order to convict him of the charge of impeding such witness or officer in the discharge of his duty, and the accused should have knowledge of notice or information of the pendency of the proceedings before he can be found guilty of obstructing the same.

Under the foregoing authorities, as we understand them, if there were no bankruptcy proceedings in fact pending, and a conspiracy was formed in contemplation of bankruptcy, and an overt act was committed prior thereto, and none thereafter, no conviction could be sustained. Before an Act can be punished as a crime under the Federal Laws that act must be specifically made a crime by statute.

Searles vs. U. S., 132 U. S. 570.
U. S. vs. Brewer, 139 U. S. 278.
U. S. vs. Chase, 135 U. S. 255.
Todd vs. U. S., 158 U. S. 278.
U. S. vs. Harris, 177 U. S. 305.
U. S. vs. Britton, 108 U. S. 199.
U. S. vs. Townsend, 148 U. S. 490.
U. S. vs. Comfort, 25 Fed. 904.
U. S. vs. Wilson, 58 Fed. 771.
U. S. vs. Deitrich, 126 Fed. 676.

POINT III.

THE ASSIGNMENTS OF ALLEGED ERROR DO NOT PRESENT QUESTIONS THAT CAN BE REVIEWED BY THE FEDERAL SUPREME COURT ON A WRIT OF ERROR.

Under Subdivision 2 of Rule 21 of the Rules of the Supreme Court of the United States, it is provided as follows:

> "A specification of errors relied upon, which in cases brought up by a writ of error shall set out separately and particularly each error asserted and intended to be urged;—"

Under this rule, it is our understanding that in proceedings in error, under the Act of March 2, 1907, it is necessary that the assignments of error only embrace the subjects covered within the limitations prescribed by that Act, namely:

(a) That the Court, by its decision or judgment quashing, setting aside or sustaining the demurrer to any indictment or any count thereof, erred and in what way in its construction of a statute or that its ruling in such decision or judgment was based upon the invalidity of a statute.

(b) That error was committed in arresting the judgment of conviction for insufficiency of an indictment, and that the decision of the Court was based upon an erroneous construction of the statute; or of the invalidity thereof. The claimed construction should be set forth.

(c) That the Court erred in sustaining a special plea in bar when the defendant has not been put in jeopardy.

An examination of the alleged errors assigned will disclose that none of them can be said to come within the limitations set forth in said Act.

Assignments of error 2 to 8, inclusive, assign subjects, as it seems to the defendants-in-error, to be not reviewable at all.

The first assignment of error seems to embrace what is designated as the Court's certificate of reasons (R. P. 19), which was obtained by the Assistant District Attorney from the Court on May 25, 1922, evidently without notice or hearing, and the plaintiff in error now urges that the Court's action in directing the verdict was controlled by the matters as set forth in said certificate.

The record (pages 84, 85) shows that on May 8, 1922, seventeen days before the certificate of reasons was made by the Court, the Court, in its instructions to the jury said:

> "This leaves the case ready for trial, just as it was before the arguments referred to were made, but in view of all the facts and the law submitted to the Court, and the Court concluding, as it does, that the indictment is invalid, because *no offence is properly charged*, and that therefore no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty, and that will dispose of the case for your purpose." (Italics ours.)

From the instructions of the Court, thus given, it seems apparent that the Court concluded that the indictment was invalid because *no offence was properly charged,* and not because of the Court's construction of any statute.

If, however, this Court should find it proper to consider the contents of the certificate of reasons (R. P. 19), then we contend that the Court's conclusions, as expressed on May 25, 1922, seventeen days after the verdict, were correct, because under Sect. 29B of the Bankruptcy Act, a conspiracy which was formed before the bankruptcy, and terminated before the bankruptcy, is not punishable under the laws of the United States without appropriate allegations to show the continuation of that conspiracy, and the doing of an overt act after the proceedings in bankruptcy were started.

Sect. 332 of the Criminal Code does not cover an aider and abettor of a bankrupt to conceal his assets from a trustee.

The Bankruptcy Act classified the offender who can conceal assets from a trustee; namely, a bankrupt, or, such who conceals after his discharge. If an individual who does not fall in that classification can commit this offence, then we contend he cannot be made a principal under Sect. 332 of the Criminal Code, in aiding and abetting a bankrupt to commit such an offence.

Field vs. U. S., supra.
U. S. vs. Waldman,
188 Fed. 524.
U. S. vs. Lake, supra.

Under the special qualifications imposed by Sect. 29B of the Bankruptcy Act, it does not admit of accessories, and hence a third person who is not the bankrupt cannot become a principal under Sect. 332 of the Criminal Code.

POINT IV.

THE SECOND COUNT OF THE INDICTMENT IS LEGALLY INSUFFICIENT.

While the second count embraces the terms "cause, procure, aid and abet" of the named defendants, to do the acts charged, the count as a whole more nearly attempts to charge a conspiracy than a concealment or an aiding and abetting.

That count fails to set forth any specifically enumerated property, or the quantity thereof. It does not set forth actual possession or control of such property by any of the defendants after the adjudication in bankruptcy. It does not set forth any facts from which the Court could say that a concealment of any property exists.

The pleader did employ the term "conceal" but that is merely a conclusion of the pleader and not a fact. It fails to state that any demand had been made by the trustee, after bankruptcy proceedings, and the alleged property claimed to be concealed.

It fails to state that anything was done by any of the defendants after the filing of the petition in bankruptcy.

The count does set forth that the act of bankruptcy consisted of purchasing merchandise on or about the first day of April, 1919 (R. P. 8), seven months before the bankruptcy, and of removing the property of said Joseph Weissman from his place of business, presumably about the time of, or shortly after its receipt but in all events long before the bankruptcy; also that the alleged concealed property belonged to Joseph Weissman; that the alleged concealment was "in manner and form aforesaid". The only act set forth in the count to which the term "aforesaid" can have reference is that of April 1, 1919, (seven months before the bankruptcy), all defendants conspired that Weissman should buy property, remove it and defraud his creditors.

If a bankrupt actually transfers property although it is done fraudulently, to keep it from his creditors, still if he does not reserve any right to a re-conveyance or any beneficial interest therein, that is, unless a secret trust in favor of himself is established, then there is no concealment from the mere fact that the property is omitted from the schedule.

Re Denby,
122 Fed. 688.
Re Jacobs,
144 Fed. 868.

The essential elements of concealment must consist of possession or control of the property; the concealment must be by the bankrupt; it must be from the trustee, and it must properly belong to the estate in bankruptcy.

In

U. S. vs. Phillips,
196 Fed. 574,

it is held that property is concealed or secreted when it is withheld by means of physical concealment, from the lawful officer who is looking for it.

The offence denounced by Sect. 29B contemplates the concealment of property by some act or acts on the part of the bankrupt, than merely omitting it from the schedule.

Re Hemdley,
Vol. 31 A. B. R., 231.

There is no allegation in the count laying the venue where the property was located at the time of the alleged concealment. The venue of concealment is the place where the property is located at the time of its concealment, and is an indispensable allegation.

Greist vs. U. S.,
231 Fed. 157.

Unless the act charged is within the language of the statute it is not an offence though the act be within the spirit of the statute.

U. S. vs. Sheldon,
15 U. S. (2 Wheat) 119, 120

The defendants-in-error in the Court below, challenged the legal sufficiency of the indictment, and each count thereof. (See argument of counsel, R. P. 30-60, inc., 79-82, inc.)

POINT V.

THE JUDGMENT ENTERED IN THE COURT BELOW IS CONCLUSIVE ON WHAT WAS DECIDED.

The plaintiff-in-error, in its brief, contends that because of the contents of what is called "certificate of reasons" (R. P. 19), this Court should hold that the decision of the Court below involved the construction or validity of a statute.

We have already pointed out that the record discloses (R. P. 84, 85) that the Court's action in directing a verdict was controlled solely by its determination, as expressed in its charge to the jury, "that the indictment is invalid because no offence is properly charged."

The judgment entered in the case (R. P. 94) recites the foregoing instructions given by the Court to the jury, and said judgment, as entered, should govern this Court, as it seems to us, in determining what was done in the Court below.

In the case of

U. S. vs. Barber,
219 U. S. 78,

this Court, in discussing what governs it in determining the action of the Court below, says:

> " . . . since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the Court in that judgment expressly placed its decision that the United States could not prosecute the defendant upon the plea of the bar of limitation."

Under this authority, it seems to us that the judgment actually entered is conclusive on the question as to what was decided.

From that judgment it appears that the Court's decision in the instant case involved the invalidity of the indictments and not the construction of a statute.

The jurisdiction of the Federal Supreme Court is limited by the Criminal Appeal Act of March 2, 1907, to the consideration only of the decision of the courts below construing a statute, and cannot be used for the purpose of correcting other errors.

We respectfully refer to the cases cited in the brief of the defendants-in-error, on the motion to dismiss.

POINT VI.

THE COURT DIRECTED THE VERDICT AFTER IT HEARD THE CLAIMS MADE BY BOTH SIDES AS TO THE SUFFIENCY OF THE INDICTMENT.

The plaintiff-in-error, in its brief, intimates that the Court's action was without any motion pending, which is an inaccurate statement.

Record pages 29 and 30 disclose htat defendants-in-error, before argument, moved to dismiss the indictment, and it was claimed

that the motion involved a question of jurisdiction. (See R. P. 29-60, inc.)

The defendants-in-error do not believe it would be of any assistance to this Court to devote any portion of this brief in reply to some of the unkind criticisms made by plaintiff-in-error against the Court below.

CONCLUSION.

The motion of the defendants-in-error to dismiss the appeal should be granted for want of jurisdiction, and the writ of error be dismissed and the judgment affirmed.

Respectfully submitted,

SLADE, SLADE & SLADE,
Attorneys for Some of the
Defendants-in-Error.

BENJAMIN SLADE,
Of Counsel.